



**THE ATTORNEY GENERAL
OF TEXAS**

January 29, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Larry A. Farrow
Executive Director
Texas Funeral Service Commission
8100 Cameron Road, Bldg. B, Suite 550
Austin, Texas 78753

LO-88-9

Dear Mr. Farrow:

By letter of October 12, 1987, addressed to Rick Gilpin, you requested advice on the authority of the Texas Funeral Service Commission to discipline a licensee who injures a consumer in the sale or management of pre-need funerals. This matter was referred to me for research. My research showed that the commission did not have such authority; and I informed you of my conclusion in a telephone conversation. In this letter I will set out in some detail the authorities and reasoning that led me to that conclusion.

As you point out in your letter, article 548b, V.T.C.S., expressly authorizes the Department of Banking to regulate the pre-need funeral industry. You suggest that the Texas Funeral Service Commission also has authority to discipline licensees for pre-need funeral violations under the following provisions of article 4582b, V.T.C.S.:

3. H. The commission may seek appropriate injunctive relief against a funeral establishment, licensed embalmer, or funeral director who fails to comply with any provision of this Act. This Act does not affect any remedy or enforcement power under other laws. . . . The commission may assess an administrative penalty and may revoke, suspend, or place on probation any licensed funeral director and/or embalmer, or apprentice and may refuse to license or admit persons to examination for any of the following reasons all of which are offenses as provided in Section 6A of this Act:

. . . .

20. Engaging in fraudulent or deceptive conduct in providing funeral services or merchandise to a consumer;

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27. Dishonest conduct or gross negligence in the practice of embalming or funeral directing that is likely to deceive, defraud, or otherwise injure the public.

4.D.1. The commission may initiate action against a funeral establishment or in regard to the license of a funeral establishment upon the following grounds:

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(b) Conducting or operating a funeral establishment in a manner which, in the discretion of the commission, after applying contemporary community standards, is found to be offensive to the common conscience and moral standards of the community where the funeral establishment is licensed or where such offensive conduct occurred.

V.T.C.S. art. 4582b. Sections 3.H.20 and 3.H.27 describe conduct which constitutes an offense under section 6A of the act. An offense under section 6A is a Class B misdemeanor subject to a fine of \$50 to \$500 or imprisonment in the county jail for not more than thirty days, or both. V.T.C.S. art. 4582b, §7.

Article 548b, V.T.C.S., governs the sale of prepaid funeral services or merchandise. Organizations desiring to sell prepaid funeral benefits must apply for a permit from the State Banking Department. V.T.C.S. art. 548b, §3. The statute requires contracts for prepaid funeral merchandise to be in writing, on a form approved by the department. Detailed provisions for handling of funds are set out in section 5 of article 548b, V.T.C.S. Organizations which have outstanding prepaid funeral benefits must maintain such records as required by the department and must make them available for examination by the department. Violations of article 548b, V.T.C.S., refusal to allow inspection of records, or dishonest practices in the sale of a contract subject to article 548b, V.T.C.S., are punishable by a fine of \$100 to \$500, or imprisonment in

the county jail for not less than one month and not more than six months, or both. V.T.C.S. art. 548b, §9.

An argument can be made that the language of section 3H.20 of article 4582b, V.T.C.S., encompasses some of the conduct that article 548b, V.T.C.S., prohibits. The language of sections 3.H.27 and 4.D.1.(b) seems less likely to reach the economic injuries covered by article 548b, V.T.C.S. Sections 3.H.27 and 4.D.1(b) appear to contemplate more tangible assaults on the sensibilities of the consumer or the public.

If, however, article 4582b, V.T.C.S., were interpreted to prohibit conduct also prohibited by article 548b, V.T.C.S., there would be a lack of certainty in the punishment such that neither punishment could be enforced. See Stevenson v. State, 167 S.W.2d 1027 (Tex. Crim. App. 1943); Cooper v. State, 8 S.W. 654 (Tex. Crim. App. 1888). That is, conduct which violates article 548b, V.T.C.S., is punishable by a fine of \$100 to \$500 or by imprisonment in the county jail for one to six months. V.T.C.S. art. 548b, §9. Offenses under section 6A of article 4582b, V.T.C.S., are punishable by a fine of \$50 to \$500 or imprisonment in the county jail for not more than thirty days or both. V.T.C.S. art. 548b, §9. The two statutes provide for different punishments. If the same acts are made an offense by different statutes that provide different punishments, the lack of certainty in the punishment prevents either punishment from being enforced. Ex parte Sanford, 289 S.W.2d 776 (Tex. Crim. App. 1956); Stevenson v. State, 167 S.W.2d 1027 (Tex. Crim. App. 1943); Moran v. State, 122 S.W.2d 318 (1938).

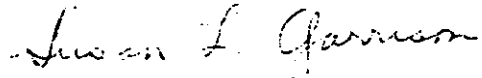
It is presumed that the legislature intended the entire statute to be effective. Independent Life Insurance Co. v. Work, 77 S.W.2d 1036 (Tex. 1934). A court will, if possible, adopt an interpretation which renders a provision valid, rather than nullifying it. Spense v. Fenchler, 180 S.W. 597 (Tex. 1915).

Nothing in the language of article 4582b, V.T.C.S., or article 548b, V.T.C.S., suggests that the legislature intended the Texas Funeral Service Commission to take action against funeral service licensees who violate article 548b, V.T.C.S. If such a construction is adopted, an uncertainty as to the penalty will arise that will prevent the enforcement of either penalty provisions and thus defeat the legislative intent in adopting those provisions. The better view is that the Texas Funeral

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Service Commission does not have authority to take action
against licensees based on their violation of article
548b, V.T.C.S.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

SLG/er

cc: Vickie Guerra
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